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No. 82-48

IN THE
SUPREME COURT FOR THE UNITED STATES

October Term, 1982

WILLIAM AND MARY LOU CASTORR, Petitioners,

vs.

JOHN M. BRUNDAGE, Judge of Probate of Calhoun County, Michigan; CALHOUN COUNTY PROBATE COURT; MICHIGAN DEPARTMENT OF SOCIAL SERVICES; PATRICK ANDERSEN individually and as an employee for the Michigan Department of Social Services; LEONARD and GLODIA SHUMATE, individually and as foster parents for the Michigan Department of Social Services, Respondents.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Guardian ad Litem for
Donald Wayne Castorr

August 4, 1982

QUESTIONS PRESENTED

1. The guardian ad litem adopts the questions set forth in the Petition in opposition to a Writ of Certiorari filed in behalf of respondents, John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

NAMES OF PARTIES

1. The only party to these proceedings whose name is not included in the caption of the case is Donald Wayne Castorr, subject of these proceedings.

2. Thomas D. Geil is the duly appointed guardian ad litem of Donald Wayne Castorr.

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, respectfully prays that Petitioners' Petition for Certiorari be denied and that the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982 be allowed to stand.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 674 F.2d 531. The District Court Opinion, which was affirmed by the Sixth Circuit, is unreported.

JURISDICTION

The guardian ad litem adopts the explanation of jurisdiction as set forth in the Petition in opposition to a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit submitted in behalf of respondents John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

STATUTES INVOLVED

See Petition in opposition to a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit submitted in behalf of respondents John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

STATEMENT OF THE CASE

Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, accepts the Statement of the Case as set forth in Petitioner's Petition.

REASONS FOR NOT GRANTING THE WRIT

1. PREFACE

Transcript pages of the hearings and depositions are identified as follows: Parenthetical numbers refer to the pages in the transcript of hearings held before the Calhoun County Probate Court; those preceded by the letters "HA" refer to pages in the deposition of Dr. Alfred Hamady, taken on October 26, 1976; those preceded by the letter "H" refer to pages in the deposition of Dr. Nancy J. Hopwood taken on October 28, 1976: those preceded by the letters "D1" refer to pages in the deposition of Ethel Dudde taken on December 7, 1976; those preceded by the letters "D2" refer to pages in the deposition of Ethel Dudde taken on December 23, 1976; those preceded by the letter "V" refer to pages in the deposition of Dr. Wiecher H. VanHouten, taken on January 19, 1977. Transcript quotes are unedited.

This brief is submitted as a supplement to the brief filed by the respondents. Because of the nature of the case, we felt that its essential facts should be summarized. Time is of the essence in this action. Too much time has already elapsed. How much more delay is reasonable? We believe none.

Donald Castorr was five years old when

this action was started. He is now eleven. He has a right to get on with his life. He doesn't really care about the legal issues. He had a miserable life with his natural parents and is now, relatively speaking, thriving. The natural parents were given due process in the Michigan courts. Indeed, they were given every chance to reform. Now they ask for one more chance. Judge Brundage of the Calhoun County Probate Court made a difficult but just decision. Please on behalf of Donald Castorr, let Judge Brundage's decision stand.

2. WHY DID ALL THE PARTIES STIPULATE ON FEBRUARY 17, 1976, THAT THE CALHOUN COUNTY PROBATE COURT COULD ASSUME JURISDICTION OVER DONALD AS AN EMOTIONALLY NEGLECTED CHILD?

A. A Profile of Donald Wayne Castorr in Approximately September and October of 1975.

Donald Wayne Castorr was born on August 7, 1970 and weighed 4 lbs 13 oz. At approximately age one his mother believed he weighed 17 or 18 lbs. (P Ex. 2) When he was seen at

Leila Hospital in Battle Creek on September 15, 1975, the approximate date proceedings were commenced in the Calhoun County Probate Court, he weighed only 20 lbs. and was 34-3/4 inches. (P Ex 2) A normal five year old boy would be approximately 40 lbs. and 40 inches. (HA 10)

Thus, in approximately four years, Donald Castorr had gained only two or three pounds even though during this time his mother said he was not ill. (P Ex 2) Moreover, his x-rays revealed bone development of a two to two and a half year old (HA 8); he walked like a two year old (HA 11); he was abusive in behavior and language ("corn cob up your ass", and "dump shit") (12); he wore diapers and was not toilet trained (14); nor was he able to dress himself or brush his teeth. (73-75)

His foster mother, Gloria Shumate, described his behavior during the month of October as follows:

> "Emotionally, Donald was very abusive, he had glasses and he would rip them off and throw them

on the floor, if you picked them up he would slap you on the face, hit you in the neck, pull your hair. If you had jewelry on he would grab it and rip it off you, his language was very vulgar, also on a physical aspect he had developed a type of walk, it was a shuffle, it wasn't a walk, if you were at the other end of a hall, it was like a train sound. He didn't use muscles of his legs at all, he just shuffled, there was no evidence of his using his muscles at all in his legs." (12)

He also, according to Mrs. Shumate, seemed to be unfamiliar with objects which most of us observe and experience on a daily basis. Mrs. Shumate said:

"Well, we brought Donald home, we took him out in the back and sat him on the ground and he immediately began to scream and he was lifting his feet up, saying 'what is it, what is it?' He was referring to the grass, he didn't understand what the grass was. When we took him inside, the main thing that we had trouble with was doors, he had to open every door, every cupboard, and sometimes not just to look on the other side but repeatedly open and shut and open and shut. The sun not only hurt his eyes but he didn't understand, he called it a light, if the curtains were open and I wouldn't shut them, he would voluntarily climb up on the couch and pull the curtains shut because

the sun hurt his eyes. He was frightened and mad because I wouldn't turn that light off." (13)

Further, when he arrived at his foster parents' home, he could only crawl up and slide down steps, was afraid of grass (the appellants' next door neighbor of eight (8) years, Harold Oliver, testified at 763-64 that he had never seen Donald outside even though Mr. Oliver was an "outdoor nut"), was afraid of cracks in the sidewalk, and would complain of pain in his legs, even if he was on his feet for only a short time. (72-73) Mrs. Shumate indicated that he would have slept continuously if she had allowed him. (14 & 15)

"Donald slept very well, in fact, he would have slept continuously it seems if I wouldn't go in. When I would put Donald down, he would rock, he would wrap his arms around himself and he would rock to the extent that the baby bed would move on the floor and even in his sleep this went on. He would move the bed in his sleep, he would rock himself and he slept flat on his back with his arms wrapped like this. (showing the Court with her arms)

Q Wrapped around the front part of him?

A Yeah, like this, (showing the Court) and he would rock constantly, if Donald woke up, this was one thing that I didn't know, and it took awhile to learn, I would assume that Donald was still sleeping, he wouldn't be, he would be laying in there awake and he would be just waiting apparently for me to come in, he wouldn't say I'm up, I want to get up, he wouldn't get out of bed he would just wait until I would come in and realize that he was awake." (14,15)

Finally, his eating habits were almost, if not, primitive.

"A Donald had no idea how to use silverware. I understand he had started using utensils in the hospital, he did not hold them correctly. His upper lip was formed in a manner and he had a callous here ---

Q When you say here, do you mean the middle part of the lip?

A The middle part of the lip, that I saw in my children from nursing from a bottle, and he couldn't form his mouth around a spoon or a fork, he had to use his teeth to bring anything off the silverware. He ate with his hands when he did have food, he would use -- one time he would use the right hand, then he would use the left hand, he wasn't sure how to use the silver.

Q Was he able to eat regular food?

A No, the only foods that Donald recognized was milk and dry

> cereal. The first food I offered him was scrambled eggs and buttered toast, and my husband for about a week would have to hold him down and force his mouth open and then I would put the food into Donald's mouth and more times than not, he would vomit. But once he would try the food then he did very well, once he got a taste of it." (14)

This was what Dr. Hamady, a Battle Creek pediatrician, faced when he examined Donald at Leila Hospital on September 15, 1975.

B. Psychosocial Dwarfism

When Dr. Hamady examined Donald, it was apparent to him that he needed a work-up. "He looked small and he looked scrawny". (HA 10) Dr. Hamady's subsequent examination and efforts were directed toward trying to find out why Donald was so small, why he had gained only two to three pounds in approximately four years; why, in essence he was so retarded in almost every way.

After all of the relevant lab tests, with the exception of the hand and wrist x-rays, were reported as normal, (HA 8) and after ruling out all other causes (HA 24,25) such as the fact that Donald was premature at birth (4 lbs. 13 oz, HA 10), Dr. Hamady reached a

diagnosis of psychosocial dwarfism (HA 13), a conclusion also concurred in by Dr. Hopwood. (H 22)

Dr. Hamady said that psychosocial dwarfism is caused by neglect of parents, a lack of parental care usually on the part of the mother, involving very little interaction between the mother and child emotionally which leads to lack of physical contact such as caressing, holding and kissing. This lack of emotional interaction between the mother and infant results in an overall lack of development in height and weight. (HA 17,18)

The key to the diagnosis was the fact that:

> "* * * on separation from his home environment in the hospital, in the local hospital, he showed tremendous catchup growth in the subsequent five weeks in the foster care; he again showed an eight pound weight gain which is diagnostic of this condition".
>
> * * *
>
> There is no other condition in which a child may show such a traumatic catchup growth as a child who has been in a stressful

home environment, and removal from that environment shows catchup growth in three to four times the normal growth rate." (H22,23)

See also Dr. Hamady's deposition wherein the following dialogue appears:

"Q Further, Doctor, you have mentioned a number of factors which you took into consideration in arriving at your diagnosis, some of which were clinical findings, some of the tests' results and the fact that he gained weight and height following his removal from the natural home. Which one is most important of all those factors substantiating your diagnosis?

A His progress following removal from his preceding environment." (HA 27,28)

C. Donald's Catchup

On October 13, 1975, Donald had gained six pounds and grown 1/2 inch. (HA 14) Thereafter, he made remarkable strides in height and weight gains:

October 13, 1975	Weight	28 lbs.
	height	35-1/2
Jan. 9, 1976	weight	31 lbs
	height	37-1/4
May 11, 1976	weight	33-1/2
	height	39-1/4
Aug. 23, 1976	weight	34 lbs
	height	40-1/4

(HA 14,15)

The significance of these increases was explained by Dr. Hamady as follows:

"A The fact that he has gained within a year in height and in weight faster than the norm would indicate that prior to his being evaluated that he had not been provided with the equivalent type of care as he has had subsequent to that weight gain and height gain. There has been a drastic change from one period of time in his life to another period of time that we had observation and control over.

Q What would you normally expect a boy like this to gain in height and weight during an equivalent period?

A I would expect four to five pounds a year and two inches in height in this period. He has gained twelve pounds and five inches in height." (HA 17) (emphasis supplied)

Possibly more enlightening than the doctor's testimony about Donald's tremendous catchup were the observations of his foster mother, Gloria Shumate.

At the dispositional hearing held on February 9, 1977, the following dialogue appears and we quote it in total because we think it is extremely important.

"Q In what way has he made progress, please relate to the Court and may-

be make some comparisons to some of the problems you had before?

A Physically, I haven't been able to keep him in clothes. Donald when he came to us was wearing 18 months, that fit him the best. Donald is going into 6's now. He went from an infant size 2 shoe, he's in a 9-1/2 now, Donald's shoe size has been the big thing, every three to five weeks his shoes have had to be replaced. Emotionally, he has turned into a terrific young man, --

MR. SAUER: I'll object to this Your Honor. This is obviously a conclusion, I'll permit the witness to recite facts but not conclusions.

THE COURT: Let me ask this. Are you referring to the need for new shoes because of growth or because of wear?

A Growth.

THE COURT: The objection is sustained.

Q Now going to the question of emotional, will you describe his behavior as it has recently existed as far as an improvement over --

A Alright. Donald enjoys playing outside, this is his favorite activity, he enjoys playing with other children he particularly enjoys constructive games with Tinker Toys, blocks, he plays well with my little girl, he likes to play house, he likes to play these types of games

with her. He is very quick to apologize when he offends, he says 'I'm sorry.' He is excited about going to Sunday School, if I say I'm going shopping, if I say I'm going to get groceries he wants to go too. He does not -- you can hold him on your lap and he's not going to pull your hair or take off your glasses or any of the things he did before.

Q Now, how about his eating habits, how does he eat now?

A Constantly. Very well. Donald enjoys all foods, any food -- when Donald came with us a banana frightened him until one day he started to cry for me to put his coat back on, he didn't understand, now he will eat three or four bananas. He tries new foods, he enjoys them, he loves to go out to eat, he particularly enjoys going out for a hamburger.

Q Have there been any problems now as far as using the bathroom?

A None. There is an area -- sometimes I still do have problems when I have to wash his hair. But this is an exception.

Q Has his sleeping habits improved as far as getting up in the mornings?

A Yeah, he is usually up before the rest of the family, watching Captain Kangaroo that particular day or coming in and telling me he's hungry.

Q What about his language, has that improved?

A Yes." (16-18)

* * *

"Q Did you have occasion during the first couple of months that you had him to take him to a store?

A Yes.

Q What would his reaction be like, did he walk into the store with toys and all sorts of items?

A Yes, I would intentionally take Donald into a store and expose him to things, he would walk up to a little truck and would pick it up and tell me to look at the airplane. He would pick up a little airplane and tell me to look at the little car, he didn't relate, he was excited about what he was seeing.

Q Did he finally get to the point where he could identify what he was picking up?

A Yes.

Q How soon after the first few months did this occur? If you can give us an approximation?

A It was a very short length of time, no more than 2 months.

Q Did you ever take him to a place like McDonald's?

A Yes.

Q How would he react in that kind of an atmosphere?

A The first time we went to McDonald's, Donald hadn't been with us very long and when we went in we were eating a hamburger and french fries and he was scared, he wanted to know where the fork was, I said 'you don't eat a hamburger with a fork,' and I showed him how to pick it up with his hands and he picked it up and looked at it and he was nauseated and he couldn't make himself eat that thing.

Q He doesn't like a Big Mac?

A He does now.

Q Can he eat it all?

A Yes." (71-72)

* * *

"Q How soon after you received him did he begin to develop the kind of motor-skills that allowed him to play with the other children?

A He was out for 4 or 5 hours at a time with the other children within a month he was participating.

Q When he came to your house did he know how to brush his teeth?

A Oh no.

Q How did you show him how to do that?

A The bathroom was our biggest problem, we couldn't get him in the bathroom. We would leave the door open and allow him to observe each one of us and watch us, brushing his teeth was the first thing he ever did and he was very very

frightened. I went and got him a little stool to stand on and he stood up and I was opposite him and we did it together.

Q Okay, what about taking a bath, you told me some things about that when you first got him?

A When Donald first came, when I gave him his bath, he would shake violently and he would turn blue, he would -- like this -- when I put him in the tub he held on the sides of the tub just shaking and crying and I tried playing with him. I cleared the bubbles so he could see his toes and he would not let go the sides of that tub, he was just terrified. I started allowing him to bathe with Laura in the tub together at playtime and he would eventually use one hand and then he would play with her. Laura played an important part, 'if Laura can do it, I can do it too.'

Q Did he eventually learn to relax in the bath tub?

A Yes.

Q Can he take a bath now by himself?

A Yes." (73-74)

* * *

Q Did he ever have any trouble with nail-biting?

A Yes, when Donald came his nails were bitten way back and he had been bleeding, and he would sit and bite on his nails.

Q Does he still do this?

A No.

Q When did he quit doing this?

A Very shortly after he came.

Q Now, he wasn't toilet-trained when you received him but within a short time as I understand it, he was?

A Yes.

Q How many days did it take you to toilet-train him?

A 2 days.

Q 2 days?

A Yes.

Q Could he dress himself when he first arrived at your house?

A No.

Q He could not?

A No.

Q He couldn't put his pants on or shirts?

A No.

Q How long did it take him to learn to dress himself?

A I would say 2 months." (75)

* * *

Q When did he get to the point where he could do flips, or somersaults or climb on monkey-bars and things

like that? He obviously wasn't able to do it in October of 1975.

A I know we were so amazed at the beginning of this spring when my husband would help him up the ladder and slide to go down, and he ran outside the first pretty day and ran up to the slide and went down and we were so amazed because he had grown into coordination in the winter months and he was able to do that.

Q Was that the spring of 1976?

A Yes." (77)

D. Probate Court's Assumption of Jurisdiction and Efforts to Impress Upon Natural Parents The Need for Counseling and Rehabilitation.

Donald's tremendous catchup, both physically and emotionally, can only be explained by the change in his environment. All of the parties recognized this when they stipulated to the Court's assumption of jurisdiction. If Donald's condition was caused by a thyroid deficiency, a heart condition, or cancer, a mere change in his environment would not have cured him. The parties knew the parents would have to change if there was to be any hope of returning Donald safely to them.

When the Probate Court entered its order,

assuming jurisdiction, it stated, among other things:

> "That William A. Castorr and Mary L. Castorr shall participate and cooperate in such counseling as shall be directed by the Court, and that they shall sign releases of any information with such counseling agency or agencies, and that such counseling agency or agencies shall submit a report and evaluation of such counseling to the Court."

The importance of this provision was underscored both by the guardian ad litem and the attorney for the natural parents at the Jurisdictional hearing on February 17, 1976.

The guardian ad litem said:

> "We have entered into this situation with the understanding that they will cooperate and participate in the counseling order by the Court in return for same, I think it is fair to state we have entered into an agreement which you shortly set forth regarding visitation rights." (8)

The attorney for the natural parents said, among other things:

> " MR. SAUER: No, I explained this matter to them fully by the way of conferring with them prior to coming into the Courtroom. I would like to comment for the Record, and to my clients particularly, that

since the crux of this proceeding is to do a proper and adequate job for the subject, Donald, and that involves reintegrating him, who is now in foster care, into this family. I think it necessarily involves an overview, if not intensive counseling with all family members at least contact and an overview of the family unit as an integrated family, both as its' now constituted and as it will be constituted at such time as the Court directs the return of Donald to that home. I would like also the Record to reflect I am urging now and have earlier this morning urged my clients, Mr. and Mrs. Castorr, to participate fully, freely and openly and intensively in such counseling of a psychiatric nature, of sociological nature, of medical nature as may be available through any sources available either within or without the counseling. I think you folks will confirm that I have urged this in the office conference that we have had, I talked with Mr. Castorr privately in my office when his wife was not present and I once again indicate that it is a necessary pursuit that both of you, together and independently, follow in order to reach what you will eventually and ultimately is a satisfactory resolution of this proceeding. Do you both understand?

MR. CASTORR: Is it wise to go to two of the Child Guidance --

MR. SAUER: Mr. Castorr, it is wise to do that which those that know more about it than

any of us here in this room know recommend. Those are bridges that one can only cross when one comes to them and we'll make judgments on those at that time. But the overview of this whole situation is both you folks pursue, actively, openly, eagerly and intensively such counseling of whatever nature is recommended by knowledgable people whenever it may be so recommended. Do you so understand?

MR. CASTORR: I thought maybe we could --

MR. SAUER: Mr. Castorr, do you understand? Mrs. Castorr?

THE CASTORR'S NOD.

THE COURT: The matter of counseling that is in this proposed Order will be left at the direction of the Court. Now, I understand that some appointment has been made with the counseling agency already, is that accurate?

MR. SAUER: The Castorr's have been since sometime in the fall of 1975 been counseling with the Child Guidance and Adult Clinic of this County. We have had some discussion this morning that Family and Children's Services may be involved, I have indicated to the Court that I am investigating the availability of the services of DeLano Clinic in Borgess Hospital in Kalamazoo, I would hope that private psychiatric counseling could be avoided for obvious reasons but if that becomes necessary and other services are not

available to the extent that it's possible, I will urge it." (16,17,18)

Thus, it was eminently clear to all the parties at the Jurisdictional hearing that the Castorrs, Donald's natural parents, would have to engage in intensive counseling if they wanted to have Donald returned to them. While it was not stated on the record, it is also fair to state that everyone hoped that they would engage in the counseling and profit from it so that Donald could be returned to them.

3. A SUMMARY OF EVENTS SUBSEQUENT TO THE JURISDICTIONAL HEARING.

A. Natural Parents' Efforts to Rehabilitate or Change

While Donald was being tested by the doctors and cared for in a foster home, the Calhoun County Probate Court took action to see if the parents could be rehabilitated. As previously stated, the Court made it clear to the natural parents in the Jurisdictional hearing that Donald's returning to them depended in large degree on their response

to counseling. In this regard the testimony of Ethel Dudde and Dr. Wiecher VanHouten was very revealing.

Ethel Dudde, a psychiatric social worker employed by the Battle Creek Child Guidance and Adult Clinic, after counseling with the Castorrs for over a year reported some slight progress at times, but found that their capacity to shift was limited and that they did not recognize the severity of Donald's problem. (D1 10-11) She further testified that the parents' capacity to cope with stressful situations that may bring about regression was limited. (D2 14-15) Mrs. Dudde was able to develop a meaningful relationship with at least Mrs. Castorr over this one year period. Her concern was that they be rewarded when they showed some progress and there was some feeling on her part that the reward should have been visitation. However, this opinion was expressed without the knowledge of the effect that visitation may have had on Donald. (D2 35) The significance

of Mrs. Dudde's counseling experience as far as disposition was concerned was that the Castorrs were quite limited in their ability to change, and still did not recognize that Donald had a problem.

Dr. Wiecher VanHouten, a psychiatrist, who was a consultant to Battle Creek Child Guidance and Adult Clinic, exercised a supervisory function over Mrs. Dudde's counseling of the Castorrs. He testified that the Castorrs had the wrong motivation in seeking counseling. (V 11) They went to the clinic only as a means to get Donald back and never recognized the problem which resulted in Donald's removal. (V 17)

Dr. VanHouten recommended that Donald not be returned to his natural parents based upon the counseling experience (V 14,15) as he believed the Castorrs would revert back to old patterns if Donald was returned. (V 42, 32) Their lack of correct motivation and understandin of the problem, a denial, in effect, that a problem existed, was the basis for his con-

clusion that Donald should not be returned to them. Dr. VanHouten also observed that Mr. Castorr was unable to accept Donald's new behavior pattern. (V 45)

In late November of 1976, Mr. and Mrs. Castorr began to seek treatment on their own. On November 29, 1976, they consulted with Dr. Donald Rossi, an associate Professor of psychology at Hillsdale College, Hillsdale, Michigan. (418) Following this first visit, Dr. Rossi saw Mr. Castorr on December 6, 1976, December 13, 1976 and January 6, 1977. (421, 430, 449 & 450) He then saw Mrs. Castorr at two one-hour sessions on January 25, 1977 and February 2, 1977. At the February 2, 1977 session, he also saw their daughter, Susan and Donald Castorr for one hour. (459,468,95) On two other occasions, January 21, 1977 and February 4, 1977, he saw Donald again. (85)

The other two experts retained by the natural parents were Dr. Rice, a child psy-

chologist from Dallas, Texas (663), and Vickie Leonard, a social worker from Ann Arbor, Michigan, specializing and working with problem children. (226-229) Dr. Rice met with Mr. and Mrs. Castorr for one and one-half hours before she testified on March 14, 1977. (677-78) Mrs. Leonard admitted she had never met with any of the Castorrs before testifying. (273)

The treatment program recommended by the Castorrs' expert witnesses (Drs. Rossi and Rice and Vickie Leonard) was totally prospective in nature, never defined in terms of what is or what was available in Calhoun County and the surrounding area, and uncertain insofar as what its prospects of success were. (200-204, 212-218, 254, 260, 263, 313, 498 and 747)

Moreover, there is a serious question whether the program recommended by petitioners' experts would be of any value to either a family of a child who suffers from psychosocial dwarfism, or to the child. Drs. Rossi

and Rice and Vickie Leonard testified as to their experiences with children who failed to thrive and they based their opinions on those experiences. While it is true that all cases of psychosocial dwarfism could also be labeled failure to thrive, not all failure to thrive cases involve psychosocial dwarfism. Psychosocial dwarfism is a specific medical diagnosis.

In disucssing the distinctions which must be made on the issue of failure to thrive versus psychosocial dwarfism, Dr. Hopwood, Assistant Professor of Pediatrics at the University of Michigan Medical School, said:

> "A This is an area of much controversy as has been described today, and I think that as I looked over the book which was being passed around the room, Pediatric Endocrinology, (inaudible) the chapter in there probably follows my definition very closely. A child to whom I apply the term psychosocial dwarfism is usually over the age of three (3) but not always, it's a child who has a growth failure in addition to usually behaviors abnormalities which have been well described in the past starting in 1968, in a group of children who had hormones, some of whom had

hormone deficiencies and showed dramatic catch-up growth. Most of the children in whom this type of disorder is present was severely dwarfed, severely growth retarded, often if you had been able to document them at certain times during their growth retardation you would have been able to document hormone deficiency. Often at the time we see them this is no longer possible, either because they have grown some or because it is not done. In addition, these children often have many characteristic behavior abnormalities that are not present in the other children, this is usually due to the fact that one: children are mobile, they are able to get around and get into things, have developed a characteristic behavior that is not present in a younger child. Therefore, a child that at one was able to get around and get into doing some of these things might demonstrate some of these behavior abnormalities and indeed might show some of the other abnormalities characteristic of the older children. So, there is an overlap, age wise, most of the children are over the age of three (inaudible) with severe growth retardation and the behavior abnormalities indeed are children who I call psychosocial dwarfs. Some failure to thrive can apply really to all children who do not grow or who do not develop either perhaps, it's just language, perhaps it's some other emotional need, growth is one aspect to failure to thrive. One of the causes of failure to

thrive is maternal depravation on poor bonding.

Q Do you use the term failure to thrive synonymously with the term psychosocial dwarfism?

A No, I don't.

Q Is psychosocial dwarfism a specific medical diagnosis?

A Yes." (625, 626)

See also the testimony of Marjorie Bowden, Chief Social Worker in Pediatrics, O.B. & Gynecology at the University of Michigan Medical Center, at pgs. 538-540 of the trial transcript.

B. The Picture as of March 14, 1977

At the conclusion of the Dispositional hearing on March 14, 1977, certain facts were clearly evident:

1) Donald was an emotionally neglected child who suffered from psychosocial dwarfism.

2) Donald had made tremendous progress during the time he had been removed from his natural parents.

3) Visits with his natural parents caused abnormal and anti-social behavior. (19-26)

4) Donald's natural parents had made little or no progress in achieving any insight into their responsibility for Donald's condition. Indeed, there was evidence that Mr. Castorr had engaged in anti-social behavior directed against Donald's foster parents. (63-70)

5) The petitioners' experts recommended a program which was totally prospective in nature and possibly not even relevant to Donald's condition.

6) Neither of Donald's parents had testified as to their ability or inability to change or to even try to achieve some insight into the nature of the problem. In other words, Mr. & Mrs. Castorr remained silent throughout the entire hearing.

7) As of September 15, 1976, when Dr. Hopwood last saw Donald, he was still significantly growth retarded, at least two to three years below normal. (H 29)

8) Drs. Hamady, Hopwood, VanHouten and Marjorie Bowen, all recommended that parental

rights be terminated. (HA 20; VH 14,15; 556; H 36-41; 615; 643)

9) All of the experts who expressed an opinion on the subject agreed that something should be done immediately. Time was critical. (Leonard, 269; Rossi, 505; Bowden, 557, 558; H 639; and Rice, 732)

In light of these facts, Judge Brundage was faced with three possible alternatives.

First, he could have returned Donald carte blanche with no restrictions to the Castorrs. There was, of course, no support for this possibility.

Secondly, he could have accepted the petitioners' proposal and ordered that Donald be returned to the Castorrs in accordance with the program outlined by their experts. We submit that this would have involved tremendous risk with little likelihood of success.

a) Who would have administered the program? Dr. Rise is from Texas; Vickie Leonard from Ann Arbor; and Dr. Rossi - Hillsdale, Michigan.

b) What was the program? Frankly, we still do not understand precisely what the petitioners are recommending.

c) Would the Castorrs have been responsive to the program? After a year of counseling, neither had shown any progress or movement toward an understanding of the problem. We suspect they are not capable of change. Further, even their experts agree that without their cooperation and desire to change, no program, irrespective of its sophistication, would be of any help. (275,747,750)

d) Would such an experiment have been fair to Donald? Dr. Hopwood and Dr. Hamady testified that Donald could lose much of what he had gained and possibly lose more than he had gained if he were returned to his old environment. (HA 21, H 32,33)

Dr. Hopwood also stated that even a delay of three months in resolving the issue of whether parental rights should be terminated might have been devastating to Donald.

"Q Well, Doctor, just a little over a year has passed since he's been removed from his natural parents and home. What if someone were

to say to you, well, maybe the parents aren't ready now but why not give us another year and see how they do or why not give us another three or four months, what would be your reaction to that?

A Well, I think we are speaking of time here and time in children is very, very different from time in adults. Postponing a Hearing for three months may be an acceptable thing to do for an adult because that's a short period of time. For a child, that's a long period of time. For an infant, that may be half of life. So it's a very different kind of concept and this year for Donald has been a major portion of his life.

He is now a little over six years of age. I looked at his birth date again and I guess he is six years and four months instead of seven months, and this past year he has shown all of his really major gains from an infantile state. So in terms of his developmental progress, this is the major portion of his life, this one year, and to weigh that against the early years of his life, I think in, say, well it's just a small portion is wrong. We have to view it in the child's perspective.

Therefore, to postpone and wait another year with the hopes that possibly he will go back, then we have closer to eighty or ninety percent of his life that we are talking about which has been separate from his natural parents, therefore, during that period of time he's

established relationships with his foster mother and his foster father and has not established relationships with his natural parents because he has in the past established negative relationships with them; not only would he have to go through the process of establishing positive results but he would have to destroy the negative ones and I don't think it's possible for a child at age six to do that." (H37,38)

Judge Brundage's last alternative, an admittedly difficult one, was to terminate parental rights. In choosing this option, we believe he was absolutely correct. While his excellent opinion or finding speaks for itself, possibly the reasons for ordering termination can best be summed up by Dr. Hopwood in the following dialogue:

"Q As of what you know about this situation about Donald, what would you recommend as a medical expert with respect to termination and parental rights now?

A I would recommend that there be termination of parental right and the child be placed for adoption.

Q I'm sure you have covered it but why briefly?

A Why I believe that? Donald is an extremely vulnerable child who has been for the past year tossed around

in spite of the fact that he has shown catchup growth. This may not be his full potential. In addition, I think prolongation of this limbo state cannot be to his best interest." (38-39)

4. THE APPEAL

A. Calhoun County Circuit Court

Petitioners argued before the Calhoun County Circuit Court that we failed to prove by clear and convincing evidence that the petitioners would not be able to reestablish a home for Donald or improve their environment so that Donald could be safely returned to them. In a detailed and thorough opinion, Judge Stanley Everett reviewed all of the evidence and found that Judge Brundage's Order of termination was supported by an abundance of clear and convincing evidence.

He said:

" To summarize then, the proofs clearly indicate that Donald Castorr is the victim of parental neglect, although not of a deliberate nature. While the experts applied different terminology to the condition and differ, in some respects, as to its underlining cause, it was agreed that the immediate cause

was a psychological and an emotional reaction of the child to the home environment. Secondly, the evidence establishes clearly that almost immediately after the child was taken from the home accelerated growth occurred. With the exception of Doctor Rossi, who attributed this to a change of nourishment rather than a change of environment, the experts were in accord. Each expert made it clear this catch-up should be anticipated. While considerable testimony was offered in support of the proposition that a child is, under proper conditions, better off in its natural home, it appears to me from the record that the action of the Juvenile Court in removing the child at the time it did was clearly proper. As indicated above, the issue is whether the child should be returned, after proper preparation, or parental rights should be terminated. Even this area of dispute is rather narrow, for it was agreed among all the experts that unless substantial changes were made in the home environment the child should not be returned.

As pointed out above, termination of parental rights should not occur unless there was clear and convincing evidence to establish the necessity of such action, in accordance with the law. The State, of course, has the burden of proof that such necessity exists. While the statute does not spell out the exact role of the appellate court (MSA 27.3178 (45.1)), it appears to me that my function is to determine whether

there was such clear and convincing evidence. I am satisfied that there was and that the decision of the Probate Judge should be affirmed."

B. Michigan Court of Appeals and Michigan Supreme Court

Petitioners filed applications for leave to appeal both before the Michigan Court of Appeals and the Michigan Supreme Court, and both applications were denied.

C. United States District Court for Western District of Michigan, Southern Division

Petitioners filed a shot-gun complaint before the Federal District Court in Grand Rapids, Michigan. Thereafter, Judge Gibson issued a Decision on September 3, 1981, dismissing the Complaint in its entirety.

D. United States Court of Appeals for the Sixth Circuit

Petitioners filed an appeal from the decision of Judge Gibson to the United States Court of Appeals for the Sixth Circuit, and on March 23, 1982, Senior Circuit Judge Phillips issued an Opinion affirming the decision of Judge Gibson.

CONCLUSION

For the reasons set forth herein, Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

McCROSKEY, FELDMAN, COCHRANE and BROCK, P.C.

By _____
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Dated: August 3, 1982